VERMONT ENVIRONMENTAL BOARD
10iV.S.A. Chapter 151

Re: Champlain Construction Co. Inc.
Declaratory Ruling #214

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a petition for a Declaratory Ruling filed by Champlain Construction Co. Inc. on August 31, 1989: concerning whether a permit is required pursuant to 10 V.S.A.Chapter 151 for operations at a gravel pit owned by Champlain on Route 116 in Middlebury.

I. BACKGROUND

Champlain filed the Declaratory Ruling petition as an appeal from Executive Officer Advisory Opinion #88-16%. In that opinion, the Executive Officer determined that, based upon the information presented in writing to the Executive Officer, an Act 250 permit was and is required because substantialkhanges had occurred at the gravel pit.

Following a prehearing conference on October 11, 1989, party status was granted to adjoining property owners Paul and Virginia Kilty and Dora and Barry Forbes. On October 29 Champlain submitted a letter raising a number of preliminary legal 'issues. On June 5, 1990, the Board issued a Memorandum of Decision addressing the preliminary issues.

An administrative hearing panel of the Environmental Board convened the hearing on August 14, 1990, former Chair Stephen Reynes presiding. The following parties participated in the hearing:

Champlain Construction Co. Inc. (Champlain) by William Meub, Esq. and Timothy Taylor, Esq.
Paul and Virginia Kilty by Mitchell Pearl, Esq.
Middlebury Board of Selectmen and Planning Commission by Fred Dunnington

At the hearing, Champlain presented four memoranda concerning various legal issues, some of which had been raised previously. The hearing was reconvened on October 2. On that date, the Board issued a second Memorandum of Decisionconcerning the legal issues raised by Champlain.

On October 11, 1990, Champlain filed objections to the testimony of Virginia Kilty. On October 19, the Kiltys filed a response to the objections. Several additional filings concerning the objections were filed by the parties. On June 6, 1991, the hearing panel issued a ruling on the

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objections. On June 24, the parties filed proposed findings of fact.

A proposed decision was sent to the parties on May 4, 1992, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board.. On June 17, 1992; the Kiltys submitted a response to the proposed decision and on June 18 the Petitioner submitted a-.r&sponse. Having received no requests for oral argument, the Board deliberated concerning this matter on July-2, 1992. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

Having.-previously resolved all the legal issues raised, the Board must determine whether a permit is required for the operations at Champlain's gravel pit.

III. FINDINGS OF-FACT

1. Champlain operates a gravel pit (the Pit) on an approximately 45-acre parcel of land located off Route 116 in Middlebury. Until recently when it purchased the-property., Champlain leased the land from Dora Forbes.

2. The Pit has been in operation since approximately 1958 and Champlain has extracted gravel continuously during this time.

3. Machinery at the Pit starts operating at 7:30 a.m. Mondays through Saturdays and shuts down at 4:00 p.m. during the week and between 2:30 and 3:00 p.m. on Saturdays. The Pit is not operated on Sundays except in "emergencies."

4. Paul and Virginia Kilty and Mary Parks own land below and adjacent to the Pit on the west. Both parcels are located between the gravel pit parcel and Route 116. A vegetated buffer area runs between the Pit and the neighboring properties. The Kilty house is approximately 100 feet from the boundary. Champlain has erected,-a barbed wire fence along the boundary and attached ribbons and signs to the fence.

5. The property contains another gravel pit, known as the North Pit. Over the years the Pit has been expanding to the north and has reached the North Pit. This expansion has changed the contours of the land by removing a knoll. The North Pit is being used for dumping large rocks from the gravel operation.

6. Champlain has no plans to extract gravel from the North Pit.

7. Based upon information submitted by Champlain, the annual extraction rates have been as follows:

Year	Cubic Yards
1965	50,931
1966	15,000
1968	85,256
1969	66,863
1970	74,698
1971	28,225
1972	82,088
1973	67,551
1974	50,000
1975	27,796
1976	37,367
1977	33,474
1978	14,193
1979	42,764
1980	87,892
1981	46,647
1982	45,445
1983	37,616
1984	17,317
1985	62,946
1986	72,595
1987	69,042
1988	57,682
1989	45,811

8. The post-1969 estimates are based upon records kept by Mrs. Forbes of the amount Champlain paid for gravel extracted from the pit. The figures may not be accurate because the price paid for the gravel went from five cents per yard in 1971 to 10 cents per yard in 1975, but it is not known in what year the price increased.

9. With the possible exception of one or two years, the annual extraction-rates since 1970 were at or below the maximum extraction rates prior to 1970.

10. Gravel from the Pit was used for construction of Route 116 in the 1950s. Although no records exist, it is estimated that the rates of extraction were higher then than -at any time since.

11. Champlain first brought a crusher into the Pit in the mid-1960s for the -purpose of crushing gravel for the Town of Middlebury sewer plant and the construction of the airport in Middlebury. The crusher makes a rumbling sound as it crushes stone.

12. The gravel crusher is portable and is moved around in the pit as necessary. It has been situated between 400 and 1,000 feet from the Kilty residence.

13. The crusher is usually used for about six weeks in the spring. Occasionally it is used in the fall if more gravel-needs to'be crushed. The crusher is rarely used in the summer.

14. Champlain does not operate more than one crusher in the Pit.

15. A screening plant has been used in the Pit since 1963. The screening plant creates more noise than the gravel crusher. It is located approximately 200 feet from the boundary with the Kiltys' property.

16. A maximum of 6,000 cubic yards of gravel per year is crushed. The amount of gravel being crushed in the Pit has not'increased substantially since the mid-1960s.

17. Fewer trucks are required to carry the same-amount of gravel because the trucks used now are larger than the trucks used 20 years ago.

18. Some time in the 1970s Champlain began washing the crushed gravel. The water for washing the gravel is obtained from Roaring Brook, a Class B stream located approximately 1250 feet uphill from the Pit. Champlain uses sandbags to block off a portion of the brook to slow some of the water down. This creates a pool above the sandbags in which an eight-inch pipe is located that draws the water. The water is carried by

gravity approximately 1250 feet toward the gravel pit. Over that distance, the size of the pipe is reduced to six inches in diameter and then to four inches. At the bottom of the pit, a standard fire hose of approximately two inches in diameter is attached to the four-inch pipe and carries the water to the area where the crushed gravel is washed. Approximately 70 gallons per minute of water are withdrawn from the brook.

19. Roaring Brook runs dry or goes underground in the summer about 200 to 300 yards below the place where the sand bags are placed. This occurred prior to Champlain's use of the brook for its washing operation.

20. The course of Roaring Brook has not been diverted by the sand bags. Water which does not get fed into the pipe follows its original course down the brook.

21. When the washing process is completed, the sand bags have been taken out of the stream and the pipe is capped at the bank.

22. Washing gravel cleans it of sand and silt. No foreign materials are added to the water for washing the gravel.

23. The washwater goes through a pipe into a settling pond where it percolates into the ground.

24. During the spring months the flow of the brook is normally high. Water has been withdrawn from the stream from about mid-April to mid-May and occasionally in the fall when the water has been high.

25. If too much water were withdrawn from the brook or if water were withdrawn during times of low flow, the withdrawal could have a detrimental effect on the stream habitat. Low flows usually occur in the summer and fall, and low flows could occur in the spring when there has been a dry winter or there is a drought.

26. If water were to be withdrawn at times of the year other than the spring, the Agency of Natural Resources would recommend that a physical structure be placed in the stream to monitor the stream flow and the withdrawals to ensure that the minimum flow necessary to protect the stream habitat is maintained at all times.

27. An existing road in-the lower area of the Pit was recently paved for approximately 600 feet.

28.. The Forbeses have run a logging operation on the property since the 1960s. The Forbeses cut trees from the property for their wood business. This includes clearing the trees from the areas where new gravel extraction will take place, In conjunction with their operation, they have constructed roads on the Pit property.

29. In 1987, a bulldozer was used to improve or construct a logging path within 50 feet of the Kilty and Parks properties. The bulldozer was operated by Larry Danyow, the Vice President of Champlain. Tree cutting in this area also occurred at that time. This resulted in a gap in the trees through which the Pit is now visible. Neighbors have noticed more wind and dust at their, properties since these trees were cut. The logging road is now grown over and Champlain does not intend to use the road for any purpose in the future.

III. CONCLUSIONS OF LAW

An Act 250 permit must be obtained prior to the commencement of development. 10 V.S.A. § 6081(a). Any development that commenced prior to June 1, 1970 and was completed by' March 1, 1971 is considered a "pre-existing" development and is exempt from the permit requirements, except that a permit is required for substantial changes to pre-existing developments.' 10 V.S.A. § 6081(b). "Substantial change" is defined as "any change in a development ... which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a)(1) through (a)(10)." Board Rule 2(H).

, The' Board conclude-s that the pit would require a permit if the operation had commenced after 1970. Based on the evidence that this gravel pit has been operating since the 1950s, the Board concludes that the pit is pre-existing, and a land use permit is required only if there have been substantial changes to the pit since 1970.

The Board applies a two-part test to determine whether a substantial change has, occurred to a pre-existing development. First, it determines whether a cognizable physical change in the-development has occurred since 1970 or is planned to occur. Second, it determines whether any

such change has the potential for significant impact under one or more of the Act 250 criteria. See In re H.A. Manosh Corporation, 147 Vt. 367 (1986).

Allegations have been made that changes have occurred in the gravel pit since 1970. These include the expansion of the working pit; an increase in annual extraction rates; the use of Roaring Brook for washing gravel; the installationof a fence-; the construction of a logging road; and the addition of a crusher. In addition, testimony established that an existing road in the Pit was recently paved for approximately 600 feet.

Based upon the evidence, the Board concludes that the expansion of the Pit, the rate of extraction, the construction of a logging road, and the use of a crusher do not constitute changes in the operation of the Pit, for the following, reasons:

The expansion of the Pit over the years has clearly resulted in greater environmental impacts such as the loss of trees and the change in the contour of the land so that more of the Pit is visible. However, gradual expansion of a gravel pit does not, by itself, constitute a change in the gravel operation. As the Board stated in a previous Declaratory Ruling, it is the nature of gravel operations to continually expand the area from which gravel is removed. Re: Clifford's Loam and Gravel, Inc., Declaratory Ruling #90 at 2-3 (-Nov. 6, 1978). Thus the expansion alone, with no other changes, would not require a permit.

The Board also concludes, based upon the evidence of extraction'rates submitted by Champlain, that no change has occurred in extraction rates. Available pre-1970 records consist of the years 1965 through 1969; the rates for these years-range from a low of 50,931 to a high of 85,256, or an average of 54,512 cubic yards. Annual extraction rates from 1970 through 1987 are estimated to have ranged from a low of 14,193 to a high of 87,892 (or, possibly, 135,102), or an average of 50,057 cubic yards. Champlain asserts that rates were even higher in the late 1950s and early 1960s, but records for that period are not available. Based upon the figures provided, there has not been an increase in annual extraction rates since before 1970.

With regard to the construction of a logging road, the evidence demonstrated that the road was constructed in conjunction with the logging operation of the Forbeses and

has not been used for the gravel operation. It has since grown over and will not be used for the gravel operation in the future.

Concerning the use of a crusher, Champlain's witnesses testified that a crusher has been used in the pit since the mid-1960s and that Champlain never operates more than one crusher in the Pit. The Board therefore concludes that there has been no change with regard to the use of a crusher.

The Board concludes that the following activities constitute changes to the gravel operation: The paving of the road in the Pit, the installation of a fence around the perimeter of the Pit, and the withdrawal of water from Roaring Brook for washing gravel.

The second part of the analysis requires the Board to determine whether any of the changes may result in significant impact with, respect to one or more of the criteria of Act 250.

With respect to the paving of the road, the Board believes that there is no potential for significant impact. The portionof road that was paved is located in the lower area of the Pit, where there are no streams or other water bodies that could be affected by erosion during the paving. The Board therefore concludes that the road paving was not a substantial change. The Board also concludes that installation of the fence does not have the potential for significant impacts.

The Board concludes that the washing of the gravel does constitute a substantial change to the operation because it has the potential forsignificant impacts with respect to the Act 250 criteria. Testimony established that the gravel washing operation, which involves diverting and withdrawing water from a stream and piping it downhill where the gravel is washed, could be detrimental to the habitat in the stream at times of low flow or if too much water is withdrawn. This has the potential for significant impacts with respect toat least Criterion l(E) (streams) and Criterion 8(A) (wildlife habitat).

Champlain argues that there is no potential for an adverse impact upon the stream because the water is withdrawn only during times of high flow. The Board believes, however, that as long as withdrawal takes place,

the potential exists for the water to be withdrawn at times when the flow is low so that there could be a significant impact upon the stream habitat. Board Rule 2(G) defines "substantial change" as "any change in a development or subdivision which may result in significant impact with respect to any of the [Act 250] criteria ...." (Emphasis added.') This rule was ratified by the Legislature in 1985 and has the force of law. In re Spencer, 152 Vt. 330, 336-37 (1989)'. Without a permit in place that prohibits water withdrawal except at times of high flow, the potential exists for adverse impacts on the stream biota. Thus, the second test for determining whether a substantial change has occurred or will occur has been met.

Accordingly, the Board concludes that the withdrawal of water from Roaring Brook constitutes a substantial change to the gravel operation, and a permit must be obtained to authorize this change. District Commission review should not extend beyond consideration of the change identified in this decision: the water withdrawal from Roaring Brook (including installation of the pipe and construction of the settling ponds). 10 V.S.A. § 6081(b) requires a permit only for substantial changes, and not for the entire pre-existing development unless the changes permeate the entire project. Re: Ronald E. Tucker, Declaratory Ruling #165 at 7 (Feb. 27, 1985).

The Board is aware that a 23-acre gravel operation has the potential for serious impacts on the environment and on neighbors' lives, and that inequity may result from the different treatment afforded gravel pit operations depending upon whether or not they were in existence prior to 1970. However, the Board must apply the law as it is written and cannot assert jurisdiction where it is not conferred by the legislature.

IV.. ORDER

Champlain Construction must obtain a land use permit pursuant to 10 V.S.A. § 6081(a) authorizing the water withdrawal from Roaring Brook (including installation of the pipe and construction of the settling ponds). A complete land use -permit application must be filed with the District. #9 Environmental Commission within 30 days from the date of this decision.

Dated at Montpelier, Vermont, this 14th day of September, 1992.

ENVIRONMENTAL BOARD

Elizabeth Courtney, Acting Chair
Ferdinand Bongartz
Rebecca Day
Terry Ehrich
Samuel Lloyd
William Martinez
Steve Wright

Members Dissenting: Stephen Reynes
Lixi Fortna

DISSENTING OPINION OF MEMBERS STEPHEN REYNES AND LIXI FORTNA

The uncontroverted testimony, including from the State's expert, was that the water withdrawal in question did not have an adverse or significant impact on the stream or its aquatic biota. The Board's conclusion of substantial change is premised on the notion that the water withdrawal could have a significant impact if done at a higher rate of withdrawal or at a time of lower stream flow. We agree that such other-water withdrawal may result in significant impact under Board Rule 2(H), but we do not see that as the question here.

The Board decision also states that without a permit in place to prevent withdrawal at the time of low flow, the potential exists for adverse impacts on the stream biota. That 'strikes'us as circular: that without jurisdiction, there may be impacts, -therefore there is jurisdiction.'.

Accordingly, we respectfully dissent from that portion of the Board's decision which concludes that the limited water withdrawal in question triggers Act 250 jurisdiction.

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